

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES)
Tariff F.C.C. No. 1) Transmittal Nos. 873, 874, 893
Video Channel Service at)
Cerritos, California) CC Docket No. 94-81

To: The Commission

RECEIVED

AUG - 3 1994

COMMENTS BY
APOLLO CABLEVISION, INC.
ON MOTION FOR STAY

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

Apollo CableVision, Inc. ("Apollo"), by its attorneys, submits herewith its comments on the "Motion for Stay" filed herein July 26, 1994 ("Motion") by GTE California Incorporated ("GTE Telephone").

Introduction

In an Order issued herein July 14, 1994 (DA 94-784), the Common Carrier Bureau rejected the captioned Transmittal No. 874; it suspended Transmittal Nos. 873 and 893 for one day and ordered an investigation on certain factual and legal issues. In its Motion, GTE Telephone requests a stay of the Bureau's rejection of Transmittal No. 874. Indeed, the carrier states that if the Commission does not grant the Motion by August 19, or has not by that date favored GTE Telephone's July 26, 1994, Application for Review herein, the carrier will request remedial action from the U.S. Court of Appeals for the Ninth Circuit (Motion, p. 8).

As in the past, Apollo takes no position on the carrier's arguments concerning the constitutionality of the Commission's

cable/telephone cross-ownership limitations, or on the carrier's assertions of injury to itself resulting from those limitations here. As to the third and fourth elements in the Commission's consideration of a stay request, however -- injury to other parties, and public interest considerations -- Apollo offers the following comments.

Injury to Apollo

At page 12 of its Motion, GTE Telephone contends that no other party would be harmed by a grant of the stay requested. Indeed, the carrier finds "inconceivable that any person would be injured" by maintaining the status quo. GTE Telephone is wrong.

Together with Transmittal No. 873, Transmittal No. 874 represents GTE Telephone's efforts unilaterally to change financial and operating arrangements embodied in a series of long-term agreements negotiated between Apollo and both GTE Telephone and GTE Service Corporation ("GTE Service").^{1/} The nature and scope of those agreements have been detailed in prior filings by Apollo.^{2/}

Apollo has also detailed the extent to which the tariff revisions would occasion substantial and irreparable injury to Apollo.^{3/} As there shown, the proposed new tariff arrangements --

^{1/} See, e.g., Transmittal No. 873, p. 1 ("GTE California is converting its existing video transport agreement with Apollo . . . from a private contractual arrangement to a tariffed common carrier service); see also "Descriptions and Justifications," p. 1, attached to Transmittal No. 873.

^{2/} See, e.g., Apollo's "Petition to Reject of Suspend Tariffs," filed May 17, 1994, pp. 10-13, Attachments 1, 2.

^{3/} See, e.g., Letter to A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, from Edward P. Taptich, Esq., dated June 29, 1994, pp. 10-11; Letter to Honorable Reed E. Hundt, Chairman, FCC, from Charlotte J. Robak, dated July 1, 1994; Letter to David Nall, Acting Chief, Tariff Division, Common Carrier Bureau, from Edward P. Taptich, Esq., dated June 21, 1994.

the combined effects of Transmittal Nos. 873 and 8974, inseparable for this purpose -- drastically alter the financial structure established in the Apollo/GTE contracts, threatening an imminent loss of much of Apollo's nearly \$7 million investment in its Cerritos enterprise (virtually all of which has been paid to GTE Telephone).

Injury to Apollo from any implementation of the Transmittal No. 873/874 scheme, therefore, is not only "conceivable," it is demonstrable. GTE Telephone's cavalier dismissal of substantial harm to Apollo is exceeded only by the intensity of its efforts to escape contractual liability to Apollo through a tariff abrogation of the earlier Apollo/GTE Telephone agreements.

Public Interest Considerations

At pages 13-14 of its Motion, GTE Telephone argues the public interest favors maintaining the status quo because, among other things, Cerritos subscribers will otherwise "suffer a discontinuation of valuable services." In considering this argument, the Commission should bear at least two things in mind.

First, the duration of the period for GTE Telephone's experimentation has been known since 1989. Second, in a June 29, 1993 letter to Apollo, GTE's Assistant Vice President-Acquisitions/Business Development acknowledged that the carrier's FCC authority would be expiring this year, expressed GTE's intention to terminate its experimental operations, and offered its bandwidth to Apollo:

[GTE Telephone's] experimental use of broadband capacity . . . requires a special waiver from the FCC. This FCC waiver grant expires by its own terms in July 1994, unless GTE demonstrates a need to conduct further tests in Cerritos and requests an extension of the waiver for that purpose. GTE has

reviewed the status of the Cerritos test bed and has decided not to try to pursue additional experimental activities. Therefore, [GTE Telephone] will not continue full usage of its bandwidth capacity after the expiration of the waiver grant . . .

As a result, 275 MHz of broadband capacity . . . will become available to [GTE Telephone] in 1994, no later than July. Apollo Cablevision, Inc. is hereby offered the right-of-first-refusal to use this capacity^{4/}

It is clear, therefore, that GTE's programming experiments were initially authorized by the Commission, and planned by GTE Telephone, for a period to end in July, 1994, and that GTE has heretofore expressed its wind-down of experimentation to meet that timetable. The real "status quo" here would be an immediate termination of GTE's program services, not their arbitrary perpetuation.

Respectfully submitted,

APOLLO CABLEVISION, INC.

By: 

Edward P. Taptich
Kevin S. DiLallo
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East
Washington, D.C. 20005
(202) 408-7165

August 3, 1994

Its Attorneys

^{4/} See also Telecommunications Reports, dated April 4, 1994, at 36 ("In its annual report, GTE said that it completed most of the tests in Cerritos by the end of 1993 . . .").

CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 3rd day of August, 1994, caused a copy of the foregoing COMMENTS BY APOLLO CABLEVISION, INC. ON MOTION FOR STAY to be served on the following by first-class U.S. mail, postage prepaid:

A. Richard Metzger*
Acting Chief, Common Carrier
Bureau
Federal Communications
Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

David Nall*
Acting Chief, Tariff Division
Common Carrier Bureau
Federal Communications
Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

William Kennard*
General Counsel
Federal Communications
Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

John F. Raposa
GTE Service Corporation
P. O. Box 152092
Irving, Texas 75015-2092

Gail L. Polivy, Esq.
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Ward W. Wueste, Jr.
GTE Service Corp.
P. O. Box 152092
Irving, Texas 75015-2092

John B. Richards, Esq.
Keller & Heckman
1001 G Street, N.W.
Suite 500W
Washington, D.C. 20001

David L. Brenner, Esq.
David L. Nicoll, Esq.
NCTA
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Alan Gardner, Esq.
Jeffrey Sinsheimer, Esq.
California Cable Television
Association
4341 Piedmont Avenue
Oakland, California 94611

Randy R. Klaus
Senior Staff Member
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006



Roberta Schrock

* Hand delivered.